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Supreme Court of the United States

OCTOBER TERM 1937.

No. 57.

LANASA FRUIT STEAMSHIP & IMPORTING COMPANY, INC.,

Petitioner,

—against—

UNIVERSAL INSURANCE COMPANY.

RESPONDENT'S BRIEF.

D. ROGER ENGLAR,
FRANK B. OBER,
MARTIN DETELS,
Counsel for Respondent.

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OCTOBER TERM, 1937.

No. 57.

LANASA FRUIT STEAMSHIP & IMPORTING COMPANY, INC.,

Petitioner,

—against—

UNIVERSAL INSURANCE COMPANY.

RESPONDENT'S BRIEF.

Statement.

This case comes before this Court on a writ of certiorari granted to review the judgment and order of the United States Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court of the United States for the District of Maryland. The judgment of the District Court in favor of the respondent (defendant below) was entered on the pleadings.

The effect of the demurrer to the pleas in this case is to raise two questions—first, as to the sufficiency of the declaration under the principle that a demurrer raises the question of the sufficiency of the first pleading, and second, as to the sufficiency of the third plea as a bar to the action.

The right of the petitioner to recover necessarily depends upon the sufficiency of the following allegations of the declaration (R. 2):

> "the plaintiff (petitioner) was the owner of the cargo of bananas aboard the Norwegian steamship 'Smaragd' which cargo was insured by the defendant (respondent) under the policy aforesaid, and while said vessel was proceeding up the Chesapeake Bay to Baltimore on the 21st day of July 1935, and while said policy was in full force and effect, the said steamship 'Smaragd' went aground and stranded off Seven Foot Knoll in the Chesapeake Bay, and before she could be floated the entire cargo of bananas thereon became over ripe and rotted, causing a total loss of said cargo of bananas to the plaintiff, which loss was due to a cause insured against under said policy;"

The judgment on the demurrer in favor of the respondent was final, as the petitioner elected to stand on the pleadings as presented to the District Court, though offered an opportunity to enlarge and modify the Record.*

---

* NOTE: After the District Court delivered its opinion overruling the petitioner's demurrer, a colloquy took place between Court and counsel, which concluded as follows (R. 22, 23):

> "Mr. Wortche: I assume, if we went to trial with the case and this rider was put in evidence, which your Honor unquestionably would let in, you would grant a prayer taking the case from the jury, would you not?
>
> The Court: Yes. You can have an opportunity to file a stipulation with any additional pleading which will put the matter in proper shape to take an appeal. That can be a matter of understanding between the parties. As far as the Court is concerned, I understand the matter is conclusive.
>
> (Hearing closed.)"

The question presented on this appeal is stated by the petitioner as follows:

"QUESTION INVOLVED.

The question involved is: Does the general clause of the marine cargo insurance policy, insuring for loss caused by perils of the sea, cover a loss where a marine peril, viz: stranding, has so delayed the voyage that the cargo has become a total loss?" (Petition, p. 6).

As a statement of the question in very general terms, the foregoing is correct. It should be considered, however, in connection with certain of the facts on which it arises.

Thus, in the present case, the cargo was a highly perishable cargo. It is not suggested that the cargo suffered any damage excepting as a result of its own inherent vice. So far as appears, the loss occurred during a very short period of delay. The vessel was merely delayed, she was not damaged; and at no time was it necessary for the vessel to put into a port of distress or otherwise depart from the course of her intended voyage.

Furthermore, it appears from the record that the conduct of the parties themselves furnishes a clear indication of the interpretation which they placed upon the policy. If there is any doubt as to the meaning of the policy, the actual intent of the parties would seem to be controlling.

The evidence of actual intention is presented by the third plea (R., p. 13, Petition, pp. 3-5). This plea alleges that the parties, by an endorsement, for an increased premium, *specifically* covered decay of fruit in consequence of delay; and that this endorsement

was canceled prior to the loss, thus indicating a construction by the parties that the contract without such endorsement was not intended to cover loss by decay due to delay.

POINT I.

The only issue presented to the Court in this case is a question of law on which there is no conflict of authority, namely, the question whether deterioration of perishable cargo due to inherent vice while the vessel is merely delayed by sea perils, is covered by a policy which insures against sea perils but not specifically against delay.

By reason of the fact that this case comes up on the pleadings, it presents a pure question of law. The question before this Court is whether the facts stated in the declaration entitled the petitioner to recover under the policy of insurance attached to the declaration. There is no allegation that the vessel was damaged or rendered incapable of continuing and completing her voyage, or that she did not in fact complete her voyage. The only effect attributed to the stranding was delay, and there is no allegation even as to the extent of the delay.

The cargo was one of the most perishable which is ever carried. Even if it be assumed (in the absence of any allegation to that effect) that the bananas were shipped in sound condition and would have been merchantable at the end of a normal voyage, the fact still remains that both the pleadings and the nature of the cargo are consistent with the assumption that a very brief delay would and did render them worthless.

If the petitioner can recover on the declaration filed in this case, then every assured can recover under a marine policy for deterioration which takes place during a delay of one or two days due to fog or heavy weather; or while a vessel lies aground until the next high tide, a period of twelve hours or less. We stress this aspect of the case because we think it controls the precise limits of the issue before this Court.

For the reasons above stated, we submit that this Court can only reverse the decision below by holding that if a vessel is delayed by a sea peril, for however short a period, and during the delay a perishable cargo becomes worthless solely because of its own inherent vice, the loss is recoverable under the common form of marine insurance policy, without any express coverage against losses due to delay. There is no authority either in England or the United States, in support of such a decision. There is ample authority to the contrary (*infra*, pp. 9 *et seq.*).

While some inconsistencies may be found in the language of the opinions, we submit that the decisions themselves all recognize and conform to certain broad principles which dispose of the present case. These principles may be stated as follows:

1. Deterioration of perishable cargo caused through inherent vice while the vessel is delayed by a sea peril is not, without more, covered under a marine policy which does not expressly insure against such deterioration.

2. In order to recover for such deterioration, it must be shown that the adventure was not merely delayed but frustrated by reason of the vessel's forced departure from the course of her

> voyage. We have found no decision which allowed recovery of such damage in the absence of proof that the vessel had put into a port of distress and remained there for a period which constituted a virtual abandonment or frustration of the voyage.

We submit, therefore, that the question before the Court in the present case is not whether to follow English or American authorities. The question is whether this Court shall adopt a rule contrary to all existing authorities on this subject.

The case upon which the petitioner most strongly relies is *Brandyce et al.* v. *United States Lloyds, Inc.*, 207 App. Div. 665. In that case the vessel was so damaged by collision that she was obliged to put into a port of distress and discharge her cargo in order to make repairs. Owing to the perishable nature of the cargo, it was impracticable to hold it until the vessel was repaired and then reload it for carriage to destination. Accordingly, the cargo was sold and the voyage was broken up in the port of distress. The case therefore falls squarely within the second class above described. The *Brandyce* case was affirmed without opinion by the Court of Appeals of the State of New York (239 N. Y. 573). Accordingly, the basis of the decision must be sought in the opinion of the Appellate Division. We quote as follows from that opinion (at p. 667):

> "Mere delay on the voyage, as a result of which *cargo* is spoiled or damaged, is not a ground for recovery. This is exemplified by the leading case of *Taylor* v. *Dunbar* (*supra*), cited by the defendant, in which the delay was caused by tempestuous weather and in which Montague Smith,

> *J.*, said: 'The loss here has arisen in consequence of the putrefaction of the meat from the voyage having been unusually protracted. *That is a loss which does not fall within any of the perils enumerated in this policy.* To render the underwriters liable, it must be shown that the loss is proximately due to one of the known perils. *Retardation or delay of the voyage is not one of them.' The Alps* (L. R. (1893) P. D. 109, 116), also cited by the defendant, belongs to this class of cases. In *Pink* v. *Fleming* (L. R. 25 Q. B. Div. 396), however, the question presented appears to have been squarely passed upon. As a result of a collision a portion of a *cargo* of oranges and lemons was temporarily discharged into lighters, and later reloaded and the voyage continued. Upon arrival at destination it was discovered that some of the fruit was decayed, due partly to delay and partly to handling. It was held that the *delay* and not the *collision* was the proximate cause of the loss, the court saying: 'According to the *English* law of marine insurance only the *last* cause can be regarded. * * * With regard to the American authorities, the American law on the subject seems to *differ materially from our law*, and therefore, it is not necessary to consider them.' ''*

The foregoing quotation plainly shows that the Appellate Division fully accepted the principle that deterioration resulting from mere delay on the voyage is not a ground of recovery. The court clearly distinguishes between a case of mere delay (*Taylor* v. *Dunbar*) and a case where the vessel puts into a port of distress and the cargo is damaged by the treatment which it receives there (*Pink* v. *Fleming*).

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* The italics in this quotation appear in the original report but the italics elsewhere throughout the brief are ours.

There is a suggestion in petitioner's brief that a distinction may be drawn between storms and other perils of the sea. Indeed, the petitioner goes so far as to state that storms are not perils of the sea. Naturally, no authority is cited for this extraordinary proposition. The authorities to the contrary are so numerous that we shall merely cite some of the text book authorities:

> Phillips on Insurance, 5th ed. Vol. 1, sec. 1099;
>
> Arnould on Marine Insurance, 11th ed. Vol. 2, sec. 812, 813;
>
> Winter on Marine Insurance, 2d. ed. p. 155.

We think it is plain that the decision in *The Brandyce* case did not turn on any distinction between storms and other sea perils. In stating the question presented, the court said (at p. 666):

> "The precise question presented by this submission relates to whether loss by natural deterioration, during a delay in the voyage caused by a sea peril, is a loss by sea perils within the meaning and intent of the policy of insurance."

The court then went on to discuss the authorities, among which it cites with approval two cases where the peril encountered was a storm. In *Taylor* v. *Dunbar,* the storm merely prolonged the voyage; in *Williams* v. *Smith* the storm made it necessary for the vessel to put into a port of distress where the voyage was broken up. The fact that the court in the *Brandyce* case approved both of these decisions the first of which exonerated the underwriters, while the second held them liable shows clearly that the distinction which it drew was not between storms and other sea perils, but between storms which merely cause delay and storms which make it necessary for a ves-

sel to put into a port of distress and abandon the voyage.

Both in principle and on precedent, there is a wide distinction between a case where the voyage is broken up or temporarily abandoned while the vessel puts into a port of distress and discharges her cargo, and a case where a vessel is merely delayed in the prosecution of her voyage.

The question just where the line should be drawn between losses due to delay and losses due to sea perils which incidentally cause delay, is interesting and not without difficulty. We shall proceed to analyze the various decisions which must be considered in formulating a general rule on this subject. For the reasons above stated, however, we think it is clear that the present case involves only one very narrow question of law upon which there has never been any conflict of authority.

(a) Marine Insurance covers loss by sea perils. It does not cover loss from inherent vice of the goods; nor does it guarantee the maintenance by the vessel of any particular speed or schedule.

The following authorities support the opinion of the Circuit Court of Appeals:

American authorities:

Cory v. *Boylston Fire & Marine Insurance Co.*, 107 Mass. 140;
Perry v. *Cobb*, 88 Maine 435;
Bond v. *The Superb*, 1 Wall. Jr., 355, 3 Fed. Cas. 1624;
The Casey (D. C. N. Y.), 39 F. (2d) 136;
1 Phillips on Insurance, Secs. 1089, 1134;
Jordan v. *Warren Insurance Co.*, 1 Story 342, 352;
38 C. J. 1097;

Winter on Marine Insurance, 2nd ed., page 97.

English authorities:

Taylor v. *Dunbar,* L. R. 4 C. P. 206; 38 L. J. C. P. 178; 17 W. R. 382;
Pink v. *Fleming,* L. R. 25, Q. B. D. 396;
Arnould on Marine Insurance, 11th ed. Vol. 2, Sec. 778;
17 (Halsbury) Laws of England, Sec. 859;
Marine Insurance Act of 1906, Sec. 55 (2) (b).

That ships, because of the action of the elements, can not maintain such precise schedules as obtain in land transportation is obvious. The dates of arrival in the days of sailing ships could not be predicted with accuracy within weeks. While the introduction of steam has greatly shortened the duration of voyages, it has not overcome the uncertainties inherent in marine transportation. While delays due to sea perils have been reduced from weeks to days, and it has thus become possible to transport such perishable fruit as bananas, it is still by no means uncommon for ships to encounter delays which will be fatal to such perishable goods. Delays due to heavy weather, deviation to avoid danger or to render aid to ships in distress, quarantine regulations and temporary breakdowns of machinery are constantly reported in the daily press.

For hundreds of years marine insurance has been written on the basis that the underwriter does not insure that the voyage will be completed within any particular time. This is inherent in the very nature of

marine risks. As Mr. Justice Story, sitting in Circuit, said in *Jordan* v. *Warren Insurance Co.*, 1 Story 342, at page 352:

> "But the underwriters take upon themselves no risk whatsoever as to the length or duration of the voyage insured. What they undertake is that, *notwithstanding any of the perils insured against*, the ship shall be capable of performing the voyage so as to earn the freight insured; not that the voyage shall be performed in a longer or shorter period. The owner takes upon himself the chances of a short, or of a protracted voyage."

From this principle inevitably follows the elementary rule that the underwriter is not liable for loss due to inherent vice of the goods.

Arnould on Marine Insurance, 11th ed. Vol. 2, Sec. 778:

> "Upon the same ground the underwriter is not liable for that loss or deterioriation which arises solely from a principle of decay or corruption inherent in the subject insured, or as the phrase is, from its proper vice; as when fruit becomes rotten, or flour heats, or wine turns sour, not from external damage, but entirely from internal decomposition."

Phillips on Insurance, Vol. 1, Sec. 1089:

> "From the enumeration already given of the perils usually insured against, it appears that the insurers undertake to make indemnity only for damage arising from external accidents, not for that occasioned by the qualities or defects of the things insured. Policies contain a provision that

the insurers shall not be liable for any loss upon certain enumerated articles, unless it amounts to a certain rate per cent. The articles to which this provision relates are those most subject to damage and decay from their internal qualities. But independently of this provision, it is a general rule that the insurers are not, under the common form of the policy, liable for any damage or loss arising from the qualities or defects of the subject insured, since these are not among the perils assumed by the underwriter."

Sec. 1134:

"Thus, under a policy in the ordinary form, the assured must bear the loss arising from the qualities of the article insured, without any direct action of the perils insured against, as those of the sea or others, upon the specific subject of the contract. Accordingly, where a vessel was compelled by sea-damage to put into Martinique to repair, for which purpose it was necessary to discharge the cargo, a part of which consisted of porter and claret, which were liable to be spoiled by the heat of the climate, were necessarily sold. The loss was held not to be such a consequence of the perils of the seas, by which the vessel had been damaged, as to render the insurers of these articles liable for the loss. The loss arose from the action of the climate on the articles, and as this was a damage at the risk of the assured, he was not the less liable for it because it had been indirectly and incidentally aggravated by the delay occasioned by the perils of the seas which were insured against."

38 C. J. 1097:

"Insurer in general takes no risk with regard to the length or retardation of the voyage by the

perils insured against, nor to its interruption, if it is resumed or capable of being resumed; as in the case of an embargo, or where the master is detained in port by a prosecution against him for a supposed violation of law, or where he remains to prosecute a suit for collision, or where a cargo insured is sunk and raised uninjured after considerable delay and is sold for a less price owing to the delay, or where a cargo of meat, fruit, or other perishable goods is injured by the delay, or a collision causes delay for repairs."

In Winter on Marine Insurance, 2nd Ed., p. 97, the author states:

"Given the proper conditions of heat and moisture, bacterial action will commence in any animal or vegetable product. Unless such action is caused directly by an outside force, against whose action insurance is provided under the policy, the underwriter is not liable for the resultant damage. For this reason, deterioration of a commodity, due solely to delay or prolongation of transit, is not covered under a marine insurance policy in its ordinary form. It is usual in some trades, such as the importation of fresh fruit, *specifically* to cover loss or deterioration resulting from prolongation of the voyage due to breakdown of the propelling machinery, rudder trouble, or other named causes, provided the prolongation equals or exceeds an agreed number of days."

In the banana trade particularly, a few days, or even a few hours delay may spoil the fruit. Its safe arrival depends upon the manner in which it is stowed; whether it is hot or cold weather; upon the weather permitting the hatches to be kept open; upon

the direction of the wind, which may add to or destroy the efficiency of the ventilators. These factors are just as important as the length of the voyage, which may be shorter or longer depending upon sea perils encountered. Even when carried on a refrigerated vessel, a cargo of bananas may suffer serious deterioration in the course of an ordinary voyage, without any fault on the part of the carrier, if any of the surrounding conditions are unfavorable. *The "Heranger", Otis, McAllister & Co.* v. *Norwegian Motorship Heranger and Westfal-Larsen & Co.,* U. S. D. C., N. D. Calif., October 15, 1937, 1937 American Maritime Cases 1314. In other words, the risk of unpreventable spoiling is one of the ordinary risks of this business, and the mere fact that the cargo in this case spoiled in no way indicates that there was any intention of insuring against this loss. Whether the risk in this case was within the coverage depends, of course, upon the policy itself as explained by the rider elsewhere discussed. As Mr. Justice Story pointed out in the case above cited (*Jordan* v. *Warren Ins. Co.,* 1 Story 342, p. 352), the underwriters do not insure the duration of the voyage, but merely that the vessel will be able to complete it. If the damage in this case had been directly due to a sea peril, that is, if the ship had sunk or burned or the cargo had been destroyed by the entry of sea water, the underwriter would unquestionably be liable, but where the cargo suffers no physical damage through any peril of the sea there is no liability.

Taylor v. *Dunbar,* L. R. 4 C. P. 206; 38 L. J. C. P. 178; 17 W. R. 382.

In this case a cargo of meat was shipped from Hamburg for London. The vessel was delayed on

her voyage by tempestuous weather and the cargo, solely by reason of such delay, became putrid and had to be thrown overboard at sea. The cargo was covered under an ordinary policy of marine insurance, which insured (in language identical with the coverage in the case at bar) against——

> "perils of the seas * * * and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods * * * (p. 206)."

The Court held that the underwriters were not liable.

Keating, *J.*, said:

> "The facts stated in the case show beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of the voyage. That delay was occasioned by tempestuous weather; but no case that I am aware of has held that a loss by the unexpected duration of the voyage, though that be caused by perils of the sea, entitles the assured to recover upon a policy like this. I think we should be establishing a dangerous precedent if we were to give effect to Mr. Beasley's argument, seeing that there are so many cargoes which are necessarily affected by the voyage being delayed. I am not disposed to create such a precedent."

Montague Smith, *J.*, said:

> "I am of the same opinion. The loss here has arisen in consequence of the putrefaction of the meat from the voyage having been unusually protracted. That is a loss which does not fall within any of the perils enumerated in this pol-

> icy. To render the underwriters liable, it must be shewn that the loss is proximately due to one of the known perils. Retardation or delay of the voyage is not one of them. * * * If we were to hold that a loss by delay, caused by bad weather or the prudence of the captain in anchoring to avoid it, was a loss by perils of the sea, we should be opening a door to claims for losses which never were intended to be covered by insurance, not only in the case of perishable goods, but in the case of goods of all other descriptions. By the common understanding both of assured and assurers, delay in the voyage has never been considered as covered by a policy like this."

Brett, *J.*, said:

> "I am also of opinion that damage to goods caused by delay of the voyage, though the consequence of stormy and tempestuous weather, is not one of the perils covered by an ordinary policy. Such damage must have occurred many times, and yet no trace is to be found of such a claim being maintained."

The above case is cited and recognized as the law of both England and America.

> Arnould on Marine Insurance, 11th ed. Vol. 2, Sec. 778;
> 17 Halsbury, Laws of England, Sec. 859;
> *Pink* v. *Fleming,* L. R. 25, Q. B. D. 396 (*infra*);
> *The Alps,* L. R. (1893), Probate Div. p. 109, at p. 116;
> *Reischer* v. *Borwick* (1894), 2 Q. B. 548;
> *Inman S. S. Co. Ltd.* v. *Bischoff,* L. R. 7 A. C. 670, at p. 676;

Perry v. *Cobb,* 88 Maine 435, at p. 448;
Cory v. *Boylston F. and M. Insurance Co.,* 107 Mass. 140, at p. 145.

In *Pink* v. *Fleming,* L. R. 25 Q. B. D. 396, goods were insured under the ordinary form of Lloyd's policy. The ship in which the goods were laden was in collision with another ship and thereby sustained damage which rendered it necessary for her to put into a port for repairs. In order to make the repairs it was necessary to discharge a portion of the insured goods, consisting of oranges and lemons, into lighters where they remained until the repairs were effected. When the ship arrived at destination a portion of the fruit had deteriorated. Nevertheless it was held that the underwriters were not liable for the deterioration.

Bowen, *L. J.,* said:

> "Whether we consider the damage occasioned by delay or that occasioned by the handling of the fruit, the same principle appears to apply. The proximate cause of the loss was not the collision or any peril of the sea. It was the perishable character of the articles combined with the handling in the one case, and the delay in the other."

The petitioner admits in its brief (p. 20) that *Taylor* v. *Dunbar, supra,* and *Pink* v. *Fleming, supra,* represent the law of England. Nevertheless, in other parts of its brief, it attempts to question the authority of these cases. We have already pointed out that *Taylor* v. *Dunbar* is unquestioned law, both in England and in this country. *Pink* v. *Fleming*

is cited by all the authorities as still being English law.

17 Halsbury Laws of England, Sec. 859.

This section of Halsbury based upon *Pink* v. *Fleming* states:

> "As already stated, unless the policy otherwise provides, the insurer on ships or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against. From this it follows that the underwriter is not liable for damage to perishable goods, although such damage would not have arisen but for a prolongation of the voyage caused by a peril insured against."

It is true that in one of the several judgments in *Pink* v. *Fleming,* Lord Esher said:

> "The case of *Taylor* v. *Dunbar* seems to me to have been decided upon substantially the same view as that which I have endeavoured in somewhat different terms to state, and it appears to me, to be really an express authority in favour of our decision. With regard to the American authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them (p. 398)."

The first sentence in this passage shows the basis of Lord Esher's concurrence, but the petitioner relies upon the last sentence, which was also referred to in the *Brandyce* case, *supra,* as indicating that the English Court, *i. e.,* one of the judges, thought that the American authorities were different. Lord Esher did not state what American authorities he had in mind. He could not have been referring to any

American authorities differing from *Taylor* v. *Dunbar,* which he had just cited in this quotation, for the American authorities unanimously support it. Presumably he was referring to some cases that must have been cited on the *general* law of proximate causation, which counsel thought might require a different result. There are one or two parts in Lord Esher's opinion on proximate cause which went beyond the requirements of the case, and are not even law in England (Arnould on Marine Insurance, 11th ed., Sec. 783, note r.), and no doubt he had been pressed by American authorities on causation, which indicated that these particular remarks were not law here either. But the fact that a dictum of one of the judges in this case on the subject of causation has been discredited does not weaken the strength of the decision, for not only does it logically follow from *Taylor* v. *Dunbar,* the authority of which has never been impeached, but it has been codified in the Marine Insurance Act of 1906.* Subdivision 2(b), Section 55 of that Act reads as follows:

> "Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against."

The Marine Insurance Act of 1906 is set forth in Arnould on Marine Insurance, 11th ed., as Appendix

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* NOTE: The petitioner's comparison between the English Marine Insurance Act of 1906 (referred to by petitioner as the British Merchant Marine Act) and the American Merchant Marine Act of 1920 (Petitioner's Brief, p. 12) is obviously based upon a misapprehension as to the nature of the English Act. The Marine Insurance Act of 1906, as its name implies, relates solely to the subject of marine insurance, whereas the American Act of 1920 applies to the regulation of shipping generally.

A. This Act was, of course, intended to be a codification of the preexisting law.

17 Halsbury Laws of England, Sec. 859, note (h).

Actually, Lord Esher confused the issue, which is not one of causation, but of coverage, which depends on contractual intent. Many conditions permit the inherent vice of the goods to come into operation, such as hot weather, bad stowage, bad ventilation or mere lapse of time from any cause, whether due to sea peril or not. Manifestly, the question whether such a condition can be regarded as a "proximate cause" of loss or not, is of little importance in determining whether the contract is an insurance against such a condition. The question is solely one of contractual interpretation. Does the contract insure against *delay* from stranding or against *damage* from stranding? As shown by all the authorities, normally marine insurance covers damage only, not delay.

Nor is there any conflict, as argued by petitioner, between the decision appealed from in this case and the case of *Leyland Shipping Company* v. *Norwich Union Fire Ins. Soc.* (1918) L. R. App. Cas. 350, which involved only the question whether the loss of a torpedoed ship, which actually *sank,* after some subsequent intervening causes, was caused by a war peril—a pure question of causation. If the ship in the case at bar had sunk later because of strain resulting from the stranding, instead of arriving safely in port, the cases would have been parallel. Cases involving proximate causation as between sea perils and war perils have no bearing on the question whether the *coverage* of a marine policy includes deterioration from inherent vice.

That deterioration during delay, even where the delay is caused by sea perils, is not within the coverage of a marine policy has been also established by the following American cases:

Cory v. *Boylston Insurance Co.*, 107 Mass. 140.

This was a suit on a policy covering a shipment of champagne. The vessel encountered severe storms, resulting in a great delay in the voyage, and part of the shipment was damaged by sea water. A further part was spoiled or leaked out. As to the latter damage, the Court, through Mr. Justice Gray, said:

> "By the general law of insurance, underwriters against perils of the sea and other usual perils do not assume the risk of ordinary perils incident to the course of the voyage, nor of damage arising from intrinsic qualities or defects of the thing insured, including waste from ordinary leakage of liquors" (p. 144).
>
> * * * * * * *
>
> "Independently of the peculiar provisions of this policy, underwriters are not liable for injury to goods by the ordinary dampness of the hold, though aggravated *by the length of the voyage and the variety of climate through which the vessel has passed in consequence of perils of the sea,* because such injury is still, if those perils do not otherwise operate upon the goods, attributable to the nature of the goods themselves and not to the perils of the sea, as the proximate and efficient cause; * * *" (citing *Taylor* v. *Dunbar,* among other cases).
>
> * * * * * * *
>
> "In *Baker* v. *Manufacturers' Ins. Co.*, 12 Gray 603, decided by this Court in 1851, the facts curiously resembled those in the present case. The

policy was upon delicate French goods on a voyage from Havre to Boston. The vessel had an extraordinarily long passage, and met with repeated gales and stormy weather, which drove her south of her usual course, and caused her to ship heavy seas, and to strain and open her seams, but not to leak much. Upon examination of the cargo after arrival, many of the cases appeared to have been wet with salt water; some cases were damp in which there was no indication of salt water, and in some of these the goods were as much damaged as in those that appeared to have been wet; there appeared to be no difference in the nature of the damage, which consisted of discoloration and mould; and some of the witnesses were unable to determine how many of those cases the contents of which were damaged had been wet with salt water. It was held, that the insurers were liable for the damage to the goods, occasioned by their being wet with salt water; that they were not liable for any damage from the ordinary dampness of the hold, though aggravated by the length and circumstances of the voyage * * *'' (pp. 145-6).

This case has been cited with approval by the Circuit Court of Appeals for the Third Circuit in the case of *American Merchant Marine Insurance Co.* v. *Liberty S. & G. Co.*, 282 Fed. Rep. 514, at page 520.

Perry v. *Cobb*, 88 Maine 435.

This was an action on a policy of marine insurance on a shipment of lime. The vessel had encountered unusually severe weather and the lime had suffered some damage by sea water, but the amount of this loss was less than the franchise. Claim was made for deterioration of the lime and containers due to the

unusual length of the voyage resulting from sea perils. The Court held that this damage was not recoverable, saying:

> "If the goods be of a perishable nature, and decay from a protracted voyage before they can be landed, the loss would not be from a peril of the sea * * *" (p. 446).
>
> "The general rule is that everything which happens through the inherent vice of the thing * * * shall not be reputed a peril, if not otherwise borne on the policy. * * * *If the inherent vice be stimulated by a protracted voyage it is still no loss from a peril of the sea. Cory* v. *Boylston Ins. Co.*, 107 Mass. 140; *Taylor* v. *Dunbar*, L. R. 4 C. P. 206" (pp. 447-8).

Martin v. *Salem Marine Insurance Co.*, 2 Mass. 420, 429.

Here the defendant insured the hull and cargo of a schooner against various marine perils, including restraints of Princes: The schooner was held by a French cruiser for two months in an African port, and the assured claimed, among other things, for the damage done to the hull by worms during and because of such detention. The Court held that there could be no recovery because "the loss was like the wearing and natural decay of a vessel, and not by perils of the sea".

Bond v. *The Superb*, 3 Fed. Cas., p. 845.

In this case Circuit Justice Grier held:

> "Where goods are liable to loss or deterioration which arises solely from an inherent principle of decay or corruption, the owner cannot

claim for general average, notwithstanding the delay of the vessel in the port of necessity, may have added greatly to that deterioration. * * *

"* * * *No direct injury was received by the fruit in consequence of unloading and reloading it.* * * * *Now, if the mere delay which would undoubtedly increase the damage of these perishable articles when it had once commenced, is no reason why the damage whose immediate cause is the vice proper, should not be brought into general average, we can see no reason why the removal which may have increased and not caused the injury, should have a different doctrine applied to it.* * * *"

In *The Casey*, 39 Fed. (2d) 136, the District Court for the Southern District of New York held that loss from a decay of figs during delay at a port of necessity was not recoverable in general average, saying "all men know that delay does not cause decay, although it may be the occasion owing to which decay occurs."

Cases dealing with the liability of carriers are of course irrelevant in the present case. The question of fault or negligence has no bearing on the issue here, which turns on the interpretation of the contract of insurance.

(b) All of the cases relied on by the petitioner are readily distinguishable. The cases where marine underwriters have been held liable for deterioration of cargo by reason of delay are all cases which involve vessels putting into a port of distress and remaining there for a period constituting a frustration or virtual abandonment of the voyage and not merely a brief delay due to sea perils.

The following are the principal authorities relied on by the petitioner:

Brandyce et al. v. *U. S. Lloyds, Inc.*, 207 App. Div. 665, affd. 239 N. Y. 573;

Tudor v. *New England Insurance Co.*, 12 Cush. (Mass.) 554;
Magoun v. *New England Marine Ins. Co.*, 1 Story 157, 16 Fed. Cas. 483;
Brown v. *St. Nicholas Ins. Co.*, 61 N. Y. 332;
Providence Wash. Ins. Co. v. *Adler*, 65 Md. 162, 4 Atl. 121;
Musgrave v. *Mannheim Ins. Co.*, 32 Nova Scotia Reports 405;
Rodocanachi v. *Elliott*, L. R. 9 C. P. 518;
Williams v. *Smith*, 2 Caines 1, 2 American Decisions 209;
Fireman's Fund Ins. Co. v. *Trojan Powder Co.*, 253 Fed. 305.

We have already pointed out that the *Brandyce* case fully accepted the general principle that deterioration which occurs during mere delay caused by sea perils, is not recoverable as a loss caused by perils of the sea.

In the *Tudor* case, the vessel sprang a leak, her cargo was damaged by sea water, and, it became necessary for her to put into a port of refuge and discharge her cargo. The vessel was so badly damaged that she was sold and the voyage abandoned at the port of refuge. Moreover, any argument that the reasoning of that case could be applied to this, despite the difference in facts, is answered by the later Massachusetts case of *Cory* v. *Boylston*, 107 Mass. 140, *supra*.

The *Magoun* case involved insurance on the vessel and freight, but not on the cargo. The vessel was seized and detained by the local authorities at the port of loading for four months, and Mr. Justice Story said:

"The vessel was never delivered from that

peril until she was virtually destroyed and unable to perform the voyage."

There is, of course, no comparison between a vessel and a perishable cargo such as bananas. Moreover the voyage was clearly frustrated in the *Magoun* case, because the vessel was rendered permanently incapable of pursuing it.

The *Brown* case did not involve perishable cargo or any question of inherent vice. In that case the cargo of hay became a total loss when the canal boat carrying it broke in two and sank after having been blown ashore by a gale. There was some suggestion that the cargo might have been saved if ice had not formed around the barge and prevented the tugs from reaching her; but the case is so clearly distinguishable that the sole significance, if any, to be attached to it arises from the fact that the petitioner had to go so far afield to find authority which, by inference however remote, might be cited as contrary to the opinions held by the four judges who considered and decided the present case in the courts below.

Providence Washington Insurance Co. v. *Adler,* 65 Md. 162, which, incidentally, was decided in favor of the insurance company, is also readily distinguishable upon petitioner's own statement (Brief in Support of Petition, pp. 31-32).

The Nova Scotia case (*Musgrave* v. *Mannheim Insurance Co., supra*), like the *Magoun* case, involved freight insurance, *i. e.*, insurance on the earning power of the vessel, which can never sustain direct damage from sea peril. Moreover, in that case the voyage was broken up when the vessel, rendered helpless by a heavy gale, was towed into a port of

refuge where a large part of the cargo had to be discharged in order to make repairs.

In *Rodocanachi* v. *Elliott, supra,* the goods, which were not perishable, arrived in Paris by railroad and could not leave because of the German armies. The assured abandoned, claiming a loss by restraint of princes. The case did not involve any question of inherent vice or peril of the seas.

In *Williams* v. *Smith,* the voyage was broken up by a storm which caused the vessel to leak and compelled her to put into a port of distress, where a large part of the cargo was discharged in order to make repairs. The cargo consisted principally of naval stores, including tar in barrels, which is not generally considered as a perishable cargo; and the damage to it was caused in the first instance by the violence of the gale being merely aggravated by the climate at the port of distress during the delay there.

Fireman's Fund Insurance Co. v. *Trojan Powder Co.,* the Ninth Circuit case on which the petitioner relied in applying for certiorari, is perhaps the most remote of all the authorities cited by petitioner. That case held merely that where a vessel was prevented from completing her voyage by stranding, a cargo insurer whose policy contained an express agreement to pay forwarding charges was liable for the expense of forwarding, though the cargo itself was not damaged.

The five cases cited at page 2 of petitioner's brief dated October 30, 1937, are not in point. None of them involved any question of delay or inherent vice.

As appears from the foregoing review and analysis of petitioner's authorities, no case has been cited where underwriters have been held liable for deterioration resulting from delay, even though caused by sea perils, unless the vessel was driven into a port of distress and the voyage at least temporarily abandoned. We refer again to the principles stated at the outset of this brief (*supra*, p. 5), and assert with confidence that no case can be found either in England or the United States where recovery has been allowed upon a state of facts analogous to those alleged in the pleadings in the present case.

There is no force in the petitioner's argument (p. 12 of its brief) that the loss in this case is covered as a loss

> "which may reasonably be attributed to * * * collision or contact of the vessel * * * with any external substance (ice included) other than water * * *."

In the first place the language quoted is merely an exception to an exception,—*i. e.*, it is a provision that the warranty against particular average shall not apply to certain types of losses. It clearly was not intended to cover any new causes of loss which were not otherwise covered by the policy. An even more conclusive answer to this argument, however, is the fact that the case of the vessel being "stranded" is specifically dealt with earlier in the same sentence, so that the words "collision or contact * * * with any external substance" clearly cannot have been intended to include the risk of stranding.

(c) There is no support in the record for the petitioner's contention that the contract in suit was made in the State of New York, and even if that fact were established, it would not be controlling.

The petitioner and respondent are corporations of the States of Maryland and New Jersey, respectively. While the contract appears to have been countersigned in New York, the petitioner concedes that it was delivered in Maryland (Petitioner's Brief, p. 5), and the presumption is that it became effective there.

Even if the policy were a New York contract, however, this fact would not be controlling. It is well settled that in dealing with questions of general commercial law, the Federal courts are not bound by the decisions of the State courts.

> *Carpenter* v. *Providence Washington Ins. Co.*, 16 Peters (U. S.) 495, at page 511;
> *B & W Taxi Co.* v. *B & Y Taxi Co.*, 276 U. S. 518, at page 530.

See also cases cited by the Circuit Court of Appeals (R. 36). This rule applies with particular force to contracts of marine insurance. In *Aetna Insurance Co.* v. *Houston Oil & Transport Co.*, 49 F. (2d) 121 (C. C. A. 5), the Circuit Court of Appeals for the Fifth Circuit said:

> "We need not review the other decisions cited by appellee. Policies of marine insurance are governed by the General Admiralty Law. In construing them we prefer to follow the decisions of the Federal Courts and other Admiralty Courts and to put aside decisions of State Courts where they are in conflict.
>
> The policy covered the vessel on navigable waters of the United States without, as well as

within the State of Texas. It was a maritime contract and, therefore, governed by the General Admiralty Law and not by the law of Texas."

Indeed, this Court has pointed out the desirability of keeping the law of marine insurance uniform not only throughout the United States, but also as between the United States and England. *Queen Insurance Company* v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, at page 493.

POINT II.

The deliberate striking out in the policy of a provision specifically covering loss due to delay and the simultaneous reduction of the premium rate from 60c to 25c furnishes the strongest possible evidence that in this case the parties did not intend the policy to cover delay damage.

This point turns upon a fact not present in any of the authorities heretofore discussed. Hence this defense would be valid irrespective of any conclusion that may be reached on the other defenses, and irrespective of what construction might be given the policy had not the elimination by the parties of the delay damage rider clearly shown their intention to exclude delay damages.

The primary rule in the construction of a contract or policy of insurance is that the court must ascertain and give effect to the intention of the parties.

Therefore, the construction put upon an instrument by the parties is of great weight, and ordinarily is controlling.

In *Insurance Company* v. *Dutcher,* 95 U. S. 269, this Court said, page 273:

"The practical interpretation of an agreement

by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what the parties meant than to see what they have done."

Page on Contracts, Sec. 2034;
Williston on Contracts, Sec. 623;
22 Corpus Juris, 1178-80.

The record in this case clearly shows that the parties definitely intended to exclude delay damage.

The policy in the general coverage clause insured against sea perils, but in the *printed* memorandum clause (R. p. 6) excluded partial loss to fruit.

This was in turn modified by the *typewritten* provision—

"Warranted free from particular average unless the vessel or craft be stranded, sunk, burnt * * *" (R., p. 9).*

The effect of this clause is to exclude partial losses unless one of the specified events occurs on the voyage. If one of these events occurs, *e. g.*, if the vessel is stranded, the clause is nullified by its own terms, and there is no longer any distinction between a partial and total loss. Either is recoverable if caused by a sea peril; but neither is recoverable if due to inherent vice or any other cause not covered by the

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* NOTE: "Warranted", in this type of clause, means "agreed" or "stipulated". "Particular average" means "partial loss". The typewritten clause, therefore, means that the underwriter is to be liable for total losses and for general average claims, but not for partial losses, unless the vessel encounters one of the enumerated casualties, *i. e.*, stranding, sinking or burning (Winter on Marine Insurance, 2nd ed., pp. 190, 199, 213-214).

policy. The "F. P. A." (free of particular average) warranty does not add any new perils to those covered by the policy; it merely excludes certain types of losses which would otherwise be covered. Upon the actual facts of the present case, the F. P. A. warranty is, by its own terms, wholly inapplicable.

The clause above discussed, which was actually in force at the time of the stranding of the "Smaragd", is a standard clause promulgated by the Institute of London Underwriters.* Shortly before the voyage on which the stranding occurred, the parties had cancelled a very different clause which was drawn particularly with reference to fruit cargoes and was designed to give a greatly extended coverage in respect of such cargoes.

Some time after the policy became effective, namely, on April 4, 1934, in consideration of an increased premium (R. 13) a new rider was added, which for the first time specifically mentioned delay damage. The payment of the increased premium is alleged in the plea and admitted by demurrer. The added rider provided—

> "Free of particular average, unless the vessel be stranded, sunk, burned, on fire or in collision in any, all or several of which events the insurers are liable *for such loss by decay, injury or damage to the fruit, as is occasioned thereby, or occurs in consequence of* delay resulting therefrom * * *" (R. 15).

Subsequently and prior to the voyage in question, this rider was stricken out, and the premium rate on the policy was reduced from 60¢ to 25¢ (R. 13, 14).

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* NOTE: The Marine Insurance of Goods, by Frederick W. S. Poole, Appendix G, p. 383.

By this rider the underwriter specifically agreed for the *first* time to pay *delay* damage. This clearly shows that the parties never intended such a loss to be covered in the absence of the rider. It would have been a waste of money for the petitioner to pay an additional premium for this rider, if as it now claims it had already received precisely the same protection under the previous clause in the original policy quoted above. Hence, this rider supplied the coverage for a loss of fruit from *delay* during and after stranding, which had been theretofore lacking. But, as above pointed out, before this rider was added to the policy both partial and total losses of fruit in cases of stranding had precisely the same coverage against *delay* damage; that is, both were covered (as petitioner claims) or neither was covered, as we contend in Point I. There could not be a situation where one was covered and the other was not. Therefore, since the parties by this rider showed they never intended a partial loss of fruit due to a delay occasioned by a stranding to be covered in the absence of this rider (for otherwise the rider would have been a useless expense), it inevitably follows that no more did they intend a total loss of fruit resulting from a delay occasioned by or during a stranding to be covered in the absence of a similar rider specifically covering total loss due to delay occasioned by a stranding. On this point the Circuit Court of Appeals very properly said:

> "The argument advanced, at the hearing, that the rider was to cover partial losses is without point since under the policy without the rider plaintiff was insured against partial loss as well as against total loss caused by stranding, but, as we have seen, not against loss from delay incident to stranding" (R., p. 37).

Even if we were to concede for the purpose of the present argument that a marine policy would in the ordinary case cover a loss of perishable goods, resulting from delay (*i. e.* the proposition denied in the first point of this Brief), nevertheless, in spite of that general rule the parties to a marine insurance policy may certainly evidence an intention, while the policy is in force, that it is not to be interpreted as covering such a loss. If the parties evidence such intention then the policy will not cover such a loss, irrespective of what the general law on the subject may be. This rider specifically extending the coverage for loss of fruit to delay damage, for which an increased premium was paid, clearly shows that prior to the addition of this rider it was construed by the parties not to cover such damage, and the Circuit Court of Appeals so held (R. 37).

The petitioner indulges in several speculations as to why this rider was stricken out.

We do not, of course, know why the parties subsequently deleted this rider. Apparently, the insured was unwilling to pay the higher premium which was charged for delay damage, and for that reason this provision was struck from the policy. The important point is that the assured now *attempts to gain the advantage of such insurance without payment of the premium therefor.*

Petitioner contends that the rider was a reaffirmance of the general coverage clause, but if the petitioner found it necessary to pay a larger premium to obtain an interpretation of the general clause to coincide with its wishes as to coverage, surely its elimina-

tion and the reduction of premium amounted to a deliberate restriction of coverage.

Petitioner argues (Petitioner's Brief, p. 40) that the extra premium was largely for the part of the rider contained in the separate sentence and referred to as the breakdown clause. This argument has no discernible basis, and if the parties had this in mind surely they would have eliminated only the language relating to the breakdown clause and would have retained that part of the rider which dealt with delay damage, which their own actions had shown they considered necessary, even on their own theory, to amplify or at least to explain the general coverage clause. But it is absurd to think that the premium for breakdown delay alone would be more than the premium for all the other risks combined when, according to petitioner, the policy already covered several equally great risks of delay—*e. g.*, collision, stranding, fire, etc. Obviously the 25¢ rate was for marine perils only and the increase to the 60¢ rate must have been intended to cover *all delay* risks, not merely one delay risk.

Furthermore, this argument is effectively disposed of in the opinions of the two lower Courts.

The District Court rejected this argument in the following language:

> "It is true that this rider recited liability for damage directly due to some disasters, such as fire, which direct damage is covered by the clause in the policy hereinafter quoted upon which

plaintiff relies, but the reference to damage which is occasioned or occurs 'during or in consequence of delay resulting therefrom' as thus expressly provided for in the rider, is not referred to in any part of the policy in force at the time of the stranding. Therefore, to say that without this rider the policy nevertheless covers what this rider expressly covered, and for which coverage a higher premium was charged, is an argument which is not convincing."

Another effective answer to petitioner's argument is the well known fact that it is customary to include in marine policies covering fruit cargoes a clause specifically providing that the underwriter is to be liable for delay damage if the parties wish the policy to cover such damage (Winter—Marine Insurance, 2nd Ed., p. 97, quoted *supra*).

The petitioner endeavored to maintain the position in the District Court that this rider was not a part of the contract sued upon, and was, therefore, inadmissible in evidence, but appears to have abandoned this position. This argument is clearly unsound, as the striking out of words in a contract is most significant in determining the construction to be given to the remaining part of the contract.

In *Kinnear* v. *Adams, Inc.*, 142 Md. 305, the question before the Court was whether the tenant or the landlord was to be responsible for the care of water and gas pipes in the building. The written lease contained a provision that the tenant was to take care of the water and gas pipes, but this provision had been stricken out by having a pen line drawn through

it. The Court accepted this as conclusive evidence that the tenant was under no duty to take care of the water pipes.

The intention of the parties is always the principal canon of construction, and the customary interpretation of similar instruments is merely a secondary method of discovering intention. That language in an instrument having an established meaning may sometimes mean something quite different has been recognized by this Court in the case of *Thorington* v. *Smith*, 8 Wall. 1, in which, under the circumstances of the case, the common word "dollars" was determined to mean Confederate Dollars. See also

> 3 Williston on Contracts, Revised Edition, Secs. 623 and 630.

Therefore, whether, aside from the interpretation of the contract by the parties, delay damages are recoverable as claimed by the petitioner or are non-recoverable as contended by the respondent, at least in the case at bar the question has been answered by the parties themselves. Whatever the language meant to others, the parties in this case have shown a definite intent to exclude delay damage.

The Circuit Court of Appeals so held in the following language:

> "The fact that the rider, subsequently canceled, covering loss and damage from delay was affixed to the policy, shows that the parties placed the same interpretation upon the general coverage clause of the policy which we have placed upon it, and that plaintiff was willing to pay an additional premium greater than the original premium for protection against such loss and

damage. Plaintiff argues that the rider embraced causes for delay in addition to the marine perils against which the policy insured. This is true, but the fact that the rider covered also loss due to delay from those perils is strong proof that the parties did not interpret the policy without the rider as covering such loss. The argument advanced at the hearing, that the rider was to cover partial loss, is without point since under the policy without the rider plaintiff was insured against partial loss as well as against total loss caused by stranding, but, as we have seen, not against loss from delay incident to stranding. If, therefore, we thought there were any doubt as to the interpretation to be placed upon the policy, we should think, as did the judge below, that the construction which the parties themselves placed upon it would determine the question involved against plaintiff's contention. *Brooklyn Life Ins. Co.* v. *Dutcher,* 95 U. S. 269, 273, 24 L. Ed. 410; *Williston on Contracts,* Sec. 623" (R., p. 37).

POINT III.

The judgment and order of the United States Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court of the United States for the District of Maryland, should be affirmed.

Dated, November 30, 1937.

Respectfully submitted,

D. ROGER ENGLAR,
FRANK B. OBER,
MARTIN DETELS,
Counsel for Respondent.

P. 1-9

SUPREME COURT OF THE UNITED STATES.

No. 57.—October Term, 1937.

Lanasa Fruit Steamship and Importing Company, Inc., Petitioner, *vs.* Universal Insurance Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 10, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This action was brought upon a policy of marine insurance. Judgment for respondent was affirmed by the Circuit Court of Appeals (89 F. (2d) 545) and certiorari was granted. 302 U. S. —.

Petitioner was the owner of a cargo of bananas aboard the Norwegian steamship "Smaragd". While proceeding up Chesapeake Bay to Baltimore on July 21, 1935, the vessel stranded and before she could be floated the entire cargo of bananas became overripe and rotted causing a total loss. Petitioner held a floating policy of insurance which had been issued by respondent on June 23, 1933. The general coverage clause of the policy embraced perils of the sea.

To the declaration setting forth these facts and claiming that the loss was within the coverage of the policy, respondent filed four pleas, the first two pleading the general issue and the two others being special pleas. Petitioner joined issue on the first and second pleas and demurred to the third and fourth. The District Court overruled the demurrer to the third plea and, as that decision was considered by the parties and the court to be conclusive of the issue, final judgment was entered for respondent.

The third plea, thus sustained, set forth a rider which, for an additional premium, had been added to the policy on April 4, 1934, and had been canceled on January 25, 1935, before the loss occurred. The rider amended the policy so as to provide that the coverage should be "free of particular average unless the vessel be stranded, sunk, burned, on fire or in collision, in any, all or several of which events the insurers are liable for such loss by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom". The insurers

also assumed liability for such loss in consequence of delay resulting from breakage of shaft, loss of blades from propeller, and derangement or breakage of machinery or rudder and/or stern post, "whether or not the vessel be stranded, sunk, burned or in collision" provided that the loss amounted to ten per cent. after deducting five per cent. for ordinary loss.

On the cancellation of the rider it was agreed that the policy should have the same coverage as prior thereto, and the premium rate was reduced from 60 cents to the original rate of 25 cents on the $100 of risk. 89 F. (2d) p. 546.

In affirming the judgment, the Circuit Court of Appeals observed that the judgment had been entered upon the pleadings and that petitioner had conceded that its right to recover depended upon the construction of the policy. 89 F. (2d) pp. 545, 546. The appellate court then examined the policy and after a review of authorities in this country and in England held that the loss was not within the general coverage clause relating to perils of the sea. The court in concluding its opinion referred to the rider as showing that the parties had interpreted that clause in the same way. *Id.*, p. 549. We granted certiorari because of the importance of the principal question thus determined by the Court of Appeals, a question which had not been decided by this Court and as to which the decisions of other courts were said to be in conflict.

We are met by two preliminary questions. The first of these is with respect to the sufficiency of the declaration. It is suggested that the declaration does not allege that the bananas were shipped in sound condition and that they would have been merchantable at the end of a normal voyage, and that there is no allegation as to the duration of the delay. It does not appear that these questions were raised in the District Court and they were not dealt with by the Court of Appeals, which evidently assumed the sufficiency of the declaration to present the main question as to the interpretation of the general coverage clause. Both courts below have decided the case upon the assumption that the fruit was in sound condition when shipped and would have been merchantable at the end of the voyage had it not been for the stranding and the consequent delay. In view of this course of proceedings we make the same assumption. If any question as to the condition of the cargo or length of the delay and its effect had been presented in the trial court,

it might have been met by amendment of the declaration and the issue could have been tried; and if the main question, upon the assumption stated, has been wrongly decided and the case is remanded to the District Court, there will still be opportunity to try any other issues of fact or law which may properly be presented.

The other preliminary question is with respect to the effect of the rider above mentioned. We do not regard that endorsement as either controlling or persuasive. Manifestly it did not affect the application of the general coverage clause. That clause had been in effect for a long period before the rider and by express agreement that clause remained in effect after the rider was canceled. The rider covered losses not embraced in the marine perils against which the policy insured and it also covered losses which were already covered by the policy, and there was room for difference of opinion as to exactly how far the rider overlapped. The actual views of the parties when the rider was obtained and the reasons for its cancellation are not shown with any definiteness. For all that appears the insured may have been advised and may have assumed that the coverage clause of the policy gave protection in such a case as is here involved and may not have desired to continue to pay the additional premium for the other losses described. We are not called upon to speculate as to the state of mind of the insured's officers and one asserted ambiguity is not to be cured by another. If the general coverage clause permits recovery, we see nothing to defeat it in what was done in connection with the rider.

Petitioner thus states the main question broadly: Does the general clause of the marine cargo insurance policy, insuring for loss caused by perils of the sea, cover a loss where a marine peril, viz. stranding, has so delayed the voyage that the cargo has become a total loss?

Respondent contends (1) that deterioration of perishable cargo caused through inherent vice while the vessel is delayed by a sea peril, is not, without more, covered under a marine policy which does not expressly insure against such deterioration; and (2) that in order to recover for such deterioration it must be shown that the adventure was not merely delayed but frustrated by reason of the vessel's forced departure from the course of her voyage, as, for example, where the vessel has put into a port of distress and remained there for a period which constituted a virtual abandonment or frustration of the voyage.

In considering these contentions, we start with the fact that the vessel, while proceeding up Chesapeake Bay, stranded. That is alleged and conceded. Stranding is a peril of the sea. *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 438; *Richelieu & Ontario Navigation Company* v. *Boston Marine Insurance Co.*, 136 U. S. 408, 421; Arnould on Marine Insurance, 11th ed., sec. 816; Winter on Marine Insurance, 2d ed., p. 156. Loss through stranding was within the coverage of the policy. This, as the court below observed, was expressly recognized in the warranties against particular average in which loss by stranding was excepted. 89 F. (2d) pp. 546, 547. And it was the stranding which caused the delay. The case is not one of the mere lengthening of a voyage due to the ordinary vicissitudes of wind and wave against which the underwriter does not insure (*Jordan* v. *Warren Insurance Co.*, 1 Story, 342, 352) and we are not called upon to determine in what circumstances other than those now presented delay may be considered to be due to a peril of the sea within the meaning of the policy.

The cargo was perishable fruit. Respondent insists that its decay was caused by inherent vice which began to operate as soon as the fruit was picked. But, although perishable, the cargo was insured for the voyage against sea perils and the sole question is whether a sea peril caused the loss. As we have said, we must assume for the present purpose, in view of the way in which the case was presented and determined below, that the fruit was sound when shipped and would have been merchantable on arrival after a normal voyage, and that had it not been for the delay due to the stranding of the vessel, the loss would not have occurred despite the perishable nature of the cargo.

We are not impressed by the argument that to permit recovery it must appear that the adventure was not merely delayed but that it was frustrated through a forced departure of the vessel from the course of her voyage and the putting into a port of distress. So far as the cargo in question was concerned, the adventure was frustrated by the stranding and the cargo became a total loss before the vessel could be floated. That loss was just as complete as if the vessel had been compelled to put into a port and the voyage had then been abandoned.

The sole question is whether in these circumstances the stranding should be regarded as the proximate cause of the loss. Respondent contends that decay or inherent vice was the proximate cause. It is true that the doctrine of proximate cause is applied strictly in cases of marine insurance. But in that class of cases, as well as in others, the proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result. *Insurance Company* v. *Boon*, 95 U. S. 117, 130; Arnould on Insurance, 11th ed., sec. 783.

The subject was discussed in an illuminating way by Lord Shaw in his judgment in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society*, [1918] A. C. 350, 368-371. He said:

"To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

"What does 'proximate' here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed".

There, in a policy insuring a ship, there was a warranty of exception in case of hostilities or warlike operations, and the question was whether the loss of the vessel fell within the exception. The vessel was torpedoed and sustained severe injuries but succeeded in making the outer harbor of the port of Havre. Notwithstanding all efforts by pumping and otherwise, she bumped, broke her back, and sank. It was contended that she perished by a peril of the sea because sea water entered the gash in her side which the torpedo made. The entry of the sea water was indeed a peril of the sea and was proximate in time to the sinking. But as "proximate cause is an expression referring to the efficiency as an operating

factor upon the result" it was held that "the real efficient cause" of the sinking of the vessel was that she was torpedoed and hence that the loss was within the exception.

In the *Leyland* case the House of Lords approved the decision of the Court of Appeal in *Reischer* v. *Borwick* [1894] 2 Q. B. 548, where the policy covered collision with any object but excluded perils of the sea. The ship struck a snag which made a hole in her. She was anchored and the leak was temporarily plugged. Then, while she was being towed towards the nearest dock for repair, the water burst through the hole and she had to be run aground and abandoned. The contention was that the proximate cause of the damage was the excepted marine peril of the inrush of the sea water. But the Court of Appeal held that the proximate cause was the collision with the snag.

The same principle applies although within the network of causation there may be found the operation of natural forces to which a disaster, within the coverage of the policy, has given play. The decision of Justice Story in *Magoun* v. *New England Marine Insurance Company,* 1 Story 157, is an illustration. In that case the question was whether the loss was due to a restraint and detainment of government within the words of a policy insuring the vessel and freight. It appeared that there had been an arrest and detainment by the authorities of New Granada; that the vessel had been restored, but that, when restored, it was found, from her long exposure to the weather in a hot climate, in an open roadstead, that she had been so damaged that she could not perform the voyage without great repairs which would cost more than the vessel was worth; that hides belonging to the cargo had become rotten and were thrown overboard and that no other vessel could be found to carry the residue of the cargo to destination. The vessel was accordingly abandoned to the underwriters, and Justice Story held that the abandonment was good and the underwriters were liable for a total loss. He said:

"The argument is that the injury to the vessel, by the long delay and exposure to the climate, was the immediate cause of the loss, and the seizure and detainment the remote cause only; and that, therefore, the rule applies, *Causa proxima, non remota, spectatur,* and the underwriters are not liable for injury by mere wear and tear, or by delays in the voyage, or by worms, or by exposure to the climate. But it appears to me, that this is not a correct ex-

position of the rule. All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself".

In support, Justice Story referred to the decision of the Court in *Peters* v. *Warren Insurance Co.,* 14 Pet. 99, in which he delivered the opinion. In that case he put the following illustration (p. 110):

"Suppose a perishable cargo is greatly damaged by the perils of the sea, and it should, in consequence thereof, long afterwards, and before arrival at the port of destination, become gradually so putrescent as to be required to be thrown overboard for the safety of the crew: the immediate cause of the loss would be the act of the master and crew; but there is no doubt that the underwriters would be liable for a total loss, upon the ground that the operative cause was the perils of the sea".

And in the same case, Justice Story took occasion to observe that if there be any commercial contract, which, more than any other, "requires the application of sound common sense and practical reasoning in the exposition of it", it is "certainly a policy of insurance." *Id.,* p. 109.

If we apply this principle of the "real efficient cause" to the instant case, it can hardly be doubted that upon the facts assumed the loss would be within the coverage of the policy. Indeed this is not strongly contested, but it is insisted that the case is controlled by certain precedents to which we should give heed in dealing with an ancient form of words. These precedents are found in certain English cases to which the Circuit Court of Appeals referred. The court recognized that a number of American cases had taken a different view, but thought that, in the absence of a contrary decision by this Court or any federal court, the cited English cases should be followed in the view that in the field of marine insurance "it is highly desirable that our decisions be kept in harmony with those of England". 89 F. (2d) p. 549.

Reference is made to the case of *Taylor* v. *Dunbar,* L. R. 4 C. P. 206. There meat shipped at Hamburgh for London was delayed on the voyage by tempestuous weather and solely by reason of such delay became putrid and was necessarily thrown overboard. The court held that it was not a loss by perils of the sea. Judge Keating said that the facts showed "beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of

the voyage", and "that delay was occasioned by tempestuous weather". But he held "that a loss by the unexpected duration of the voyage, though that be caused by perils of the sea", did not entitle the assured to recover. Judge Montague Smith, concurring, said that if it were held "that a loss by delay, caused by bad weather or the prudence of the captain in anchoring to avoid it, was a loss by perils of the sea", the court would "be opening a door to claims for losses which never were intended to be covered by insurance, not only in the case of perishable goods but in the case of goods of all other descriptions".

The case of *Pink* v. *Fleming*, L. R. 25 Q. B. D. 396, upon which chief reliance is placed, was a case of collision. It was necessary for the damaged ship to put into a port for repairs and for that purpose to discharge a portion of the goods insured, consisting of fruit. The goods were reshipped but on arrival it was found that being of a perishable nature they had been damaged by the handling necessary for their discharge and reshipment and by the delay. The Court of Appeal held that the collision was not the proximate cause of the loss and that there could be no recovery on the policy. Lord Esher said:

"The collision may be said to have been a cause, and an effective cause, of the ship's putting into a port and of repairs being necessary. For the purpose of such repairs it was necessary to remove the fruit, and such removal necessarily caused damage to it. The agent, however, which proximately caused the damage to the fruit was the handling, though no doubt the cause of the handling was the repairs, and the cause of the repairs was the collision. According to the English law of marine insurance only the last cause can be regarded. There is nothing in the policy to say that the underwriters will be liable for loss occasioned by that. To connect the loss with any peril mentioned in the policy the plaintiffs must go back two steps, and that, according to English law, they are not entitled to do".

The court thought that the case was governed by *Taylor* v. *Dunbar, supra.* Lord Esher added—"With regard to the American authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them".[1]

[1] As to other English decisions cited below, Tatham *v.* Hodgson, 6 T. R. 656, and Inman Steamship Co. *v.* Bischoff, L. R. 7 App. Cas. 670, see Arnould on Marine Insurance, 11th ed., secs. 781, 785.

It seems that neither of these cases went to the House of Lords, and we find it impossible to reconcile Lord Esher's ruling—"that according to the English law of marine insurance only the last cause can be regarded"—with the elaborate exposition of the doctrine of proximate cause which has been given by the House of Lords in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society, supra,* from which we have quoted. And it is recognized in England that "Passages in Lord Esher's judgment in *Pink* v. *Fleming* . . . to the effect that only the cause last in time can be looked to, cannot now be supported." Arnould on Marine Insurance, 11th ed., sec. 783, *note* (*r*). So far as the English rule, however, relates to losses, on ship or goods, "proximately caused by delay", "although the delay be caused by a peril insured against", it has been embodied in statute which apparently applies to all goods, perishable or otherwise, unless the policy otherwise provides. That statute of course is controlling in relation to English practice in that class of cases. Marine Insurance Act, 1906, sec. 55 (2) (b). L. R. Statutes, 6 Edward VII, p. 227. There is no statute applicable here which so restricts the doctrine of proximate cause, as we understand it and as it is set forth in the *Leyland* case, and the weight of American authority is contrary to the doctrine of *Pink* v. *Fleming.*

In *Williams* v. *Smith,* 2 Caines 1 (1804), the action was on a policy of insurance covering a cargo consisting chiefly of naval stores, including tar in barrels, on a voyage from New York to Algiers. The vessel experienced severe weather which resulted in such serious damage that it was compelled to put into Cadiz as a port of distress. There more than half of her lading was taken out and the vessel moved to the usual place for repairing. While there an epidemic fever broke out which prevented all business and made it impossible to obtain permits for taking the cargo from the place where it had been landed. Meanwhile the vessel was driven to sea by a storm and sustained further injuries and on returning to Cadiz it was found that the cargo, both on shore and on board, from the heat of the climate and violence of the gale, was deteriorated more than one half of its original value. As the whole would not have produced enough to fit the ship for the completion of her voyage, the vessel and the cargo were abandoned to the underwriters. The

court charged the jury, among other things, that "any damages which arose in consequence of the fever at Cadiz, were within the perils of the policy". The jury brought in a verdict for a total loss. The court denied a new trial, Judge Kent stating in his opinion "that the damage resulting from the pestilence at Cadiz" was covered by the policy. The court found it unnecessary to decide "whether a pestilence is a peril direct within the policy", but held that it formed "a sound excuse for delay at Cadiz" and "if the consequence of that delay was a deterioration of the subject insured, the insurer must be answerable for the loss".

In *Tudor* v. *New England Marine Insurance Company,* 12 Cush. 554, the suit was upon a policy of insurance on a cargo of ice shipped from Boston to Calcutta. It was agreed that the ice was properly packed and surrounded with non-conductors of heat. Under the stipulations of the policy, the insurer could be liable, if at all, only for a total loss. There was also a clause that there should be no liability "for ice melting in consequence of putting into port". By perils of the sea, the vessel sprung aleak which increased and it became necessary to put away for a port. On taking out her cargo, in order to ascertain her condition and the practicability of repairs, it was found that the ice had settled, a portion of it having been melted by the sea water which had come in contact with it by reason of the leak. The ice was taken out and sold for a very small sum in comparison with its estimated value at the port of delivery. The voyage was abandoned. It was denied that the loss was occasioned by a peril of the sea. The insured had judgment for a total loss. The court considered it to be well settled that if an article insured as free from average be "placed in such a condition, that in consequence of inevitable deterioration or decay, it cannot be carried to the port of destination, but will necessarily, before the completion of the voyage, be wholly destroyed, and it is accordingly sold at an intermediate port", this would constitute a total loss within the meaning of the policy. The court also held that the exception of the risk of ice "melting in consequence of putting into port" did not include "a loss occasioned by the melting of the ice from other causes, or a combination of other causes". The real cause was the injury to the vessel which made it necessary to take out the ice in a port in the tropics. See, also, *Musgrave* v. *Mannheim Insurance Co.,* 32 Nova Scotia Rep. 405.

Cory v. *Boylston Insurance Company*, 107 Mass. 140, is cited by respondent as an answer to the *Tudor* case, but the latter was not overruled or even mentioned. In the *Cory* case a vessel with wine on board met with severe gales which prolonged her voyage and caused her to ship much sea water, and upon her arrival at the port of destination the cases of wine were found to be more or less wet either by the sea water or by the steam and dampness generated in the hold by the presence of the sea water and the changes of climate through which the vessel had passed. The case was controlled by special provisions of the policy. The policy provided that the insurers should not be liable for loss by leakage unless occasioned by stranding or collision, or "for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, musty or mouldy, unless the same be caused by actual contact of sea water with the articles damaged, occasioned by sea peril". The court thought that the latter clause was inserted with a knowledge of the decisions in *Baker* v. *Manufacturers' Insurance Co.*, 12 Gray 603, and *Montoya* v. *London Assurance Co.*, 6 Exch. 451. To bring a case within that clause the court held that it was not enough "that perils of the sea should be the efficient, and, within the rule laid down in the previous decisions, the proximate cause, by which the sea water was shipped", but that the sea water "must come into actual contact with the articles, for the damage to which the underwriters are sought to be charged".

Respondent also cites *Perry* v. *Cobb*, 88 Me. 435, where the insurance was on a cargo of lime shipped by a brig from Rockland to New York. The voyage was prolonged on account of rough weather but the vessel arrived tight and only slightly damaged. No sea water had reached the cargo unless in a few instances where a hatch had been taken off or once when the cabin was flooded. That damage was far below the partial loss which had been excepted from the coverage. The remaining damage was "from the shrinking of the staves of the barrels and slacking up of the cooperage", causing a loss of contents and making the barrels insecure for hoisting,—a condition which was claimed to have resulted from the rolling and pitching of the vessel caused by the storms of an unusually protracted voyage. The court said that "All authorities agree that a protracted voyage is not a sea peril within a marine policy, because it is not an unusual event, but one of the natural incidents to sea

transit"; that the evidence was conflicting "as to the proximate cause for the condition of the cargo upon its arrival"; that the associates, who in this case had insured each other and to whom it was agreed that the question of liability should be submitted, were men of large experience in burning and shipping lime; and that their decision against the plaintiff "must have great weight upon the fact as to whether the condition of the cargo, upon its arrival in New York, was other than what might have been expected from ordinary sea weather at that time of year", without any "unusual sea peril". The conclusion was that the principal damage to the cargo came "from its own inherent qualities, excited by the long continued transit". *Id.*, pp. 449, 450.

In the case of *Bond* v. *The Superb*, 1 Wall. Jr. 355, 3 Fed. Cas. 845, also cited by respondent and the court below, the decision of Mr. Justice Grier at circuit turned upon the question of liability for general average and in this view had distinguishing features.

Fourteen years ago a case closely resembling the one at bar came before the New York courts. *Brandyce* v. *United States Lloyds* (*The Corsicana*), 207 App. Div. 665, 239 N. Y. 573. The action was upon policies covering a cargo of potatoes insured against perils of the sea. The vessel, in consequence of a collision at sea with some unknown object, was compelled to put into Charleston for repairs where it was found necessary to discharge the cargo. After repairs the vessel resumed her voyage but, on account of the delay, the potatoes because of sprouting and rot had to be sold. They were not injured directly in the collision or touched by sea water. The precise question presented was "whether loss by natural deterioration, during a delay in the voyage caused by a sea peril, is a loss by sea perils within the meaning and intent of the policy of insurance". The Appellate Division reviewed the authorities in England and in this country. The court held that mere delay on the voyage, as a result of which cargo is spoiled or damaged, was not a ground for recovery. But the court found that the collision, the sea peril insured against, was the real cause of the loss. The court said: "The evidence indicates that if the *Corsicana* had not been damaged by reason of sea perils, the potatoes would have arrived sound. The proximate cause of the loss, therefore, was the sea peril because it was the *efficient* dominant cause which, although incidentally involving *delay*, placed the cargo in such a condition

that, because of inevitable deterioration or decay, it could not be reshipped and carried to its destination". The Court of Appeals of New York stated the question in the same way and affirmed the judgment.

We lay on one side cases of protracted voyages caused by storms and the special questions to which their varied circumstances give rise. Such a case is not before us. The instant case is one of stranding, a sea peril insured against, and we think that the well-settled doctrine of proximate cause, meaning the real efficient cause of the loss, requires the conclusion that, upon the assumptions of fact we stated at the outset, the loss of the cargo was within the general coverage clause of the policy.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice McREYNOLDS and Mr. Justice SUTHERLAND are of opinion that the case was correctly decided by the court below on grounds adequately stated.

A true copy.

Test:

Clerk, Supreme Court, U. S.